Supreme Court, U.S.
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No. 03-05

IN THE

Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

INTRODUCTION

The decision of the Sixth Circuit should not be allowed to stand due to the widespread effect it will have on undermining one's ability to protect its rights and, more specifically as it relates to constitutional rights.[1] Further, as set forth in the original Petition to this Court, the Sixth Circuit abused its discretion in denying Petitioner's Motion to Intervene and the Sixth Circuit's decision conflicts with holdings of this Court and other courts as it relates to the timeliness of filing a motion to intervene.

Three Briefs in opposition to the Petition for Writ of Certiorari were filed with this Court by several respondents, although noticeably absent is any response from the City of Detroit which was an original defendant in this lawsuit and a current Appellee in the Sixth Circuit. The importance of this fact is more fully explained below.

The opposition to the Petition for a Writ of Certiorari set forth some misstatements and improperly placed great reliance on the Release between your Petitioner and the City of Detroit executed in 1997.

REASONS FOR GRANTING THE PETITION

Although the Sixth Circuit did not address the issue of standing in its Order (See Appendix A of Petition for

1. In the instant matter, the Sixth Circuit determined that the ordinance at issue was unconstitutional and in violation of the First Amendment Free Speech Clause. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Board, et al.* 276 F.3d 876 at 879 (6th Cir. 2002) (hereinafter "Lac Vieux II").

Certiorari), the Respondents have placed reliance upon a Consent and Release executed by Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") between Detroit LLC and the City of Detroit.[2]

The only party that was released by Detroit LLC has apparently chosen not to file any sort of opposition to this Petition for a Writ of Certiorari.[3]

There is no mention in the Release of any other beneficiary and, in fact, the Release is specifically limited to:

> The City of Detroit, including all departments, agencies and commissions thereof, and their respective principals, agents, consultants, attorneys, advisors, employees, officers and directors.

(See paragraph 11 of the Consent and Release, Reply App. 4a).

If the Respondents are beneficiaries at all, they are incidental beneficiaries, not direct beneficiaries. Under Michigan law, incidental beneficiaries who are not named in the contract are not entitled to enforce the contract or any of its provisions. *Paul v. Bogle*, 193 Mich. App. 479, 44 N.W. 2d 778 (1992); *Dynamic Construction Co. v. Barton Mallow Co.*, 214 Mich. App. 425, 543 N.W. 2d 31 (1995).

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2. That Consent and Release was attached as Exhibit A to Detroit LLC's Motion to Intervene filed in the Sixth Circuit.

3. It is worth noting that the City of Detroit also did not file a response to Detroit LLC's Motion to Intervene at the Sixth Circuit.

Respondents' attempt to overcome their lack of privity of the Release at issue by citing to the matter of *Barden Detroit Casino, L.L.C. v. City of Detroit*, 230 F.3d 848 (6th Cir. 2000). (See Brief in Opposition for Respondent MGM Grand Detroit, L.L.C., page 9.) The *Barden* decision was made prior to the January 2002 ruling in *Lac Vieux II* which held the Ordinance is unconstitutional. Further, the court in *Barden* stated:

> Insistence upon execution of the Release as a condition of participation in the selection process may or may not be constitutional . . .

Barden Detroit Casino, L.L.C. v. The City of Detroit, 203 F.3d 848, 855 (6th Cir. 2000).

Since the ruling in *Lac Vieux II*, any assumption that the release is valid is most likely contrary to controlling law. "A state actor cannot constitutionally condition the receipt of a benefit . . . on an agreement to refrain from exercising one's constitutional rights, especially one's rights to free expression." *G & V Lounge, Inc. v Michigan Liquor Control Commission,* 23 F 3d 1071, 1077 (6th Cir. 1994), citing to *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697-98, 33 L. Ed. 2d 570 (1972). Further, one can only waive a known right. *Sambo's Restaurant, Inc. v City of Ann Arbor*, 663 F.2d 686, 693 (6th Cir. 1981). Detroit, L.L.C. did not know it was waiving a constitutional right at the time it signed the release as the ordinance had yet to be ruled unconstitutional.

Several misstatements were made in Respondents' Opposition Briefs, specifically MGM states: "Intervention into appellate proceedings is permissive only." (See Brief in

Opposition for Respondent MGM Grand Detroit, L.L.C., page 7.) This gratuitous statement was made without any case law to support it because, in fact, it is not true.[4] Respondents have not cited any case law, court rule or statutory law prohibiting intervention as of right at the appellate level because, in fact, no such prohibition exists. The Sixth Circuit Order of March 28, 2003 specifically references Federal Rules of Civil Procedure 24 and states:

> The standards for intervention set forth in Fed. R. Civ. P. 24 provide guidance for the exercise of our discretion. Both intervention as of right and permissive intervention require that the application to intervene be timely.

(Petition App A, page 2a.)

Accordingly, the Sixth Circuit recognized that the Appellate Courts look to the Federal Rules of Civil Procedure 24 for guidance and specifically recognize that intervention as of right is a possibility at the Appellate level.

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4. MGM also states that Detroit, LLC failed to list MGM as a respondent along with Atwater Entertainment Associates, L.L.C. (See footnote 1, Brief in Opposition for Respondent MGM Grand Detroit, L.L.C., page 1.) This statement is not true. MGM and Atwater Entertainment Associates were recognized and served with the Petition for a Writ of Certiorari along with all the other respondents as is evidenced by the Proof of Service filed with the Clerk of the Supreme Court of the United States and is evidenced by the fact that MGM and Atwater Entertainment Associates filed a Response.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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